APPENDIX A
Opinion of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7698

ROBERT E. FUNKHOUSER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

(Argued October 6, 1958. Decided October 13, 1958)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and HARRY E. WATKINS, District Judge.

Robert E. Funkhouser, Pro Se, and Leon H. A. Pierson, United States Attorney, for Appellee.

PER CURIAM:

Upon his conviction on June 20, 1952, for income tax evasion, the appellant was sentenced to imprisonment for one year and a fine of $25,000.00. He served the term and paid the fine. On March 28, 1958, nearly six years after his trial, he filed a motion under Rule 35 of the Federal Rules of Criminal Procedure to "correct an illegal sentence."

Relief was not sought under Section 2255 of Title 28, U.S.C.A. Denial of the motion resulted in this appeal.

The appellant expresses dissatisfaction with the lawyers who represented him at the 1952 trial, because they failed to interpose certain defenses suggested by him. These lawyers, not court appointed but selected and paid by the defendant, are men of standing and ability. One defense which they failed to make is expressed by the appellant in forty-five separate "grounds," but there are essentially an assertion that the District Court of Maryland, where the indictment and trial took place, had no jurisdiction. The appellant claimed that venue was in the United States District Court for the District of Columbia, where he resided and conducted his business. Under the law, as it then was, the appellant was subject to indictment and trial for income tax evasion in the District Court for Maryland, because he resided in the taxing district of Maryland, which includes the District of Columbia, and filed his return in the office of the District Commissioner of Internal Revenue at Baltimore. See *Boyles* v. *United States*, 73 F.2d 772 (4 cir., 1934).[1]

The appellant's main contention, which was not argued by his counsel, was that he could not lawfully be prosecuted for income tax evasion because, he alleges, before indictment his return was not audited to determine the exact amount of tax due by him. His reasoning is that in these circumstances no tax was "imposed" within the meaning of Sec. 145(b) of the Internal Revenue Code of 1939, with the evasion of which he could be charged. Evidently the appellant confuses the imposition of the tax with its assessment. The statute itself "imposes" the tax; and while there can be no *civil* action to enforce collection before the

[1] Congress has recently revised this procedure. By 72 Stat. 512, approved August 6, 1958, a defendant can make a motion to be tried in the judicial district in which he was residing when the alleged offense of tax evasion was committed.

assessment procedures provided for in Sec. 272(a) of the Internal Revenue Code of 1939 have been followed, there is no requirement for the precise computation and assessment of the tax before there can be a criminal prosecution for fraudulent tax evasion under Sec. 145(b).

The appellant also argues that the Commissioner had not, prior to the prosecution, passed upon each of 30,000 claimed deductions. At the trial the Government did prove that, by making various false claims for deductions, a substantial understatement of taxable income in the defendant's returns had occurred. This is sufficient basis for a criminal prosecution without first establishing the precise amount of the defendant's tax indebtedness. In later civil proceedings for the collection of the tax due by the appellant there was a determination and assessment as provided for in Sec. 272(a) of the Internal Revenue Code of 1939.

After conviction, the appellant dismissed his lawyers and employed new counsel; but by then the time for appeal had expired. This lawyer then filed a motion in appellant's behalf to enlarge the time for appeal and, after hearing, this motion was properly denied under Rule 45(b), Federal Rules of Criminal Procedure.

The present motion is not available to redetermine issues tried in the District Court in 1952. It cannot be used as a substitute for an appeal, nor are special circumstances shown here, as were shown in *U. S.* v. *Morgan*, 346 U. S. 502 (1954), where the Court entertained a motion for a writ of error *coram nobis* after the defendant had served his sentence. In any event, Rule 35 is a remedy only to correct an illegal sentence; and the sentence imposed here is not illegal in the sense that it is in excess of the punishment authorized by Sec. 145(b) of the Internal Revenue Code of 1939. As we have shown, there is no merit in the contention that the Court was without jurisdiction to try the offense; nor is there any suggestion that the trial was

for any other reason, illegal, or that the defendant's constitutional rights were violated as in the Morgan case.

We think, therefore, that Judge Chesnut, who presided at the original trial and to whom the defendant directed the motion to correct the sentence, properly overruled the motion, and his action is

Affirmed.

APPENDIX B

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7698

ROBERT E. FUNKHOUSER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

ORDER

The Motion for Rehearing, designated "Petition to Reconsider the Decision of October 13, 1958," and the subsequent motions dated October 25 and October 28, 1958, having been considered by the Court, and the Court being of the opinion that they present no new matter or other ground for rehearing, the same are hereby overruled.

SIMON E. SOBELOFF
United States Circuit Judge

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

HARRY E. WATKINS
United States District Judge

Filed November 3, 1958
R. M. F. Williams, Jr., Clerk
A TRUE COPY

APPENDIX C

Internal Revenue Code of 1939 Applicable to This Case

SECTION 41. ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

"The net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income."

SECTION 29.41-3. METHODS OF ACCOUNTING. It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so.

SECTION 29.51-5. USE OF PRESCRIBED FORMS. Each taxpayer should carefully prepare his return so as fully and clearly set forth the data therein called for.

SECTION 29.54-1. RECORDS AND INCOME TAX FORMS. Every person subject to the tax, shall for the purpose of enabling

the Commissioner to determine the correct amount of the income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under Chapter 1.

SECTION 57. EXAMINATION OF RETURN AND DETERMINATION OF TAX.

As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.

SECTION 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return.

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed.

SECTION 271-1. DEFICIENCY DEFINED. Section 271 by its definition of the word "deficiency" provides a term which will apply to any amount of tax determined to be due in respect of a taxable year in excess of the amount of tax reported by the taxpayer for such year; or in excess of the amount reported by the taxpayer as adjusted by way of prior assessments, abatements, credits, refunds, or collections without assessment.

When a case is considered for the first time, the deficiency is the excess of the amount determined to be the correct amount of the tax over the amount shown as the

tax by the taxpayer on his return, or, if it is a case where no tax was reported by the taxpayer, the deficiency is the amount determined to be the correct amount of the tax. Subsequent information sometimes discloses that the amount previously determined to be the correct amount of the tax is less than the correct amount, and that a redetermination of the tax is necessary. In such a case the deficiency on redetermination is the excess of the amount determined to be the correct amount of the tax over the sum of the amount of tax reported by the taxpayer and the deficiency assessed in connection with the previous determination. If it is a case where no tax was reported by the taxpayer, the deficiency is the excess of the amount determined to be the correct amount of tax over the amount of the deficiency disclosed by the previous determination.

SECTION 272. PETITION TO BOARD OF TAX APPEALS. "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed the taxpayer may file a petition with the Board of Tax Appeals (known as the Tax Court of the United States) for a redetermination of the deficiency. No assessment of a deficiency in respect to the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final."

SECTION 145(b). FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX. "Any person required under this chapter to collect, account for, and pay over

any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties imposed by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000. or imprisoned for not more than five years, or both, together with the costs of prosecution.